Nos. 09-1454 and 09-1478

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In The
Supreme Court of the United States

BOB CAMRETA,

Petitioner,

v.

SARAH GREENE, personally and as next friend for S.G., a minor, and K.G., a minor,

Respondent.

JAMES ALFORD, Deschutes County Deputy Sheriff,

Petitioner,

v.

SARAH GREENE, personally and as next friend for S.G., a minor, and K.G., a minor,

Respondent.

On Writs Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

AMICUS CURIAE BRIEF OF THE DISTRICT ATTORNEYS OF SAN DIEGO COUNTY, CALIFORNIA AND SACRAMENTO COUNTY, CALIFORNIA IN SUPPORT OF PETITIONERS, BOB CAMRETA AND JAMES ALFORD, DESCHUTES COUNTY DEPUTY SHERIFF

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457 of 35

QUESTION PRESENTED

The state has a special need and historical obligation to protect children. Implicit in this relationship is the requirement for child abuse investigations to be conducted in a manner improving outcomes for children. Oregon and other states have adopted statutes which mandate non-discretionary, multidisciplinary, governmental investigations of all child abuse reports, but only permit involuntary provision of services when the state has reasonable cause to believe that abuse has occurred. A determination of reasonable cause is often impossible without an initial interview of the child. Should the state be required to obtain permission from a parent, who may be an abuser or enabler, to interview a reported child abuse victim on public school grounds during regular school hours, when neither probable cause nor exigent circumstances can be shown as demanded by the Ninth Circuit? Or should this Court find that these non-discretionary investigations serve a special need beyond that of normal law enforcement justifying a reasonable school interview of a child in order to determine if abuse has occurred without probable or even reasonable cause?

TABLE OF CONTENTS

Page

Question Presented i

Table of Authorities v

Interest of the *Amici Curiae* 1

Summary of Argument 2

Argument 4

A. The state has a "special need" and historical obligation to protect children which far exceeds the normal need for law enforcement detection and prosecution 4

1. Children are vulnerable and deserving of protection from abuse and the effective administration of services that improve their future outcomes 7

2. Statistical data show provision of services as a result of child protection investigations results in increased provision of voluntary preventive services to children, even when abuse claims are unsubstantiated..... 9

B. Artificial distinctions between government actors should not preclude the use of investigative techniques that improve outcomes for children 12

1. The participation of law enforcement is not prohibited in special needs cases..... 12

TABLE OF CONTENTS – Continued

Page

2. Modern law enforcement duties include functions traditionally reserved for regulatory administrators, social workers, community leaders, educators, and parents 14

3. The majority of states endorse a multidisciplinary approach to child protection and the participation of law enforcement officers in these multidisciplinary teams has specifically improved outcomes for children, which is necessary to further the regulatory scheme 16

C. Applying the warrant requirement of the Fourth Amendment to the initial interview of a child in a non-home setting will result in a failure to protect children..... 19

1. First indications to the state regarding alleged abuse of a child rarely provide sufficient information to prove probable cause or exigent circumstances and warrants based on less than probable cause have been disapproved 21

D. Oregon's child protection statute provides an adequate substitution for the warrant requirement..... 23

TABLE OF CONTENTS – Continued

Page

E. When an allegation of child abuse comes to the attention of state actors, confined by statute to a non-discretionary response, they should be able to conduct a reasonable interview with the child in a school setting without probable cause, reasonable suspicion, or parental consent in order to determine if the child needs protection 24

Conclusion..... 26

TABLE OF AUTHORITIES

Page

CASES

Board of Education v. Earls, 536 U.S. 822 (2002) 8

Delaware v. Prouse, 440 U.S. 648 (1979) 7, 8

Ferguson v. City of Charleston, 532 U.S. 67 (2001) 13, 14

Greene v. Camreta, 588 F.3d 1011 (2010) 2, 9

Griffin v. Wisconsin, 483 U.S. 868 (1987) 22

New York v. Burger, 482 U.S. 691 (1987) ..... *passim*

People v. Ray, 21 Cal.4th 464 (1999) 15

Safford Unified Sch. Dist. #1 v. Redding, 129 S. Ct. 2633 (2009) 26

United States v. Biswell, 406 U.S. 311 (1972) 20, 24

United States v. Martinez-Fuentes, 428 U.S. 543 (1976) 9, 10, 11, 13

Vernonia School District 47J v. Acton, 515 U.S. 646 (1995) 8

Wyman v. James, 400 U.S. 309 (1971) 5, 9

STATUTES

42 U.S.C. § 13031 (1990) 16

1993 Ore. ALS 546 ..... 6, 13

California Government Code § 26500 1

California Penal Code § 11174.3(a) (2010) 20

TABLE OF AUTHORITIES – Continued

Page

Or. Rev. Stat. § 419B.007 (2009) 6, 13

Or. Rev. Stat. § 419B.020 (2009) 23

Or. Rev. Stat. § 419B.045 (2009) 20

Supreme Court Rule 37.2(a).....1

Supreme Court Rule 37.4 1

OTHER AUTHORITIES

Doriane Lambelet Coleman, *Storming the Castle to Save the Child* 47 Wm. AND MARY L. REV. 413 (2005).....10

J. Robert Shull, *Emotional and Psychological Child Abuse: Notes on Discourse, History and Change* 51 STAN. L. REV. 1665 (1999).....5

Kenneth Dodge & Doriane Lambelet Coleman, *Preventing Child Maltreatment: Community Approaches*, The Guilford Press, 159 (2009).....10

Matthew Bell, *Fourth Amendment Reasonableness: Why Utah Courts Should Embrace the Community Caretaking Exception to the Warrant Requirement* 10 BOALT J. CRIM. L. 3 (2005).....15

NHTSA, *Children Traffic Safety Facts* DOT HS 811157 (2008), www.nhtsa.gov 7

Theodore P. Cross et al., *Police Involvement in Child Protective Services Investigations: Literature Review and Secondary Data Analysis*, Child Maltreatment, Vol. 10, No. 3, 221-244 (2005).....17, 18

TABLE OF AUTHORITIES – Continued

Page

U.S. Department of Health and Human Services, Administration on Children, Youth and Families, *Child Maltreatment* (2007), *available at* http://www.acf.hhs.gov/programs/cb/pubs/cm07/cm07.pdf 11

U.S. Department of Health and Human Services, Administration on Children, Youth and Families, *Child Maltreatment* (2008), *available at* http://www.acf.hhs.gov/programs/cb/pubs/cm08/cm08.pdf 7, 12, 19, 20, 21

Vicky Bollenbacher & Taina Sakagawa, *Justice, Therapeutic and Hybrids and Implications for Children's Rights: A Review of State Policy*, Children and Youth Services Review 28 ECHYSR 6, 682-703 (2006) 16, 17

William J. Novak, *Common Regulation: Legal Origins of State Power in America* 45 HASTINGS L.J. 1061 (1994) 4, 5, 14

WEBSITES

http://sheriff.deschutes.org/Community/Kids-Safety (2010) 15

http://www.acf.hhs.gov/programs/cb/pubs/cm07/chapter2.htm#screen 11

http://www.acf.hhs.gov/programs/cb/pubs/cm07/chapter6.htm 11

http://www.acf.hhs.gov/programs/cb/pubs/cm08/chapter2.htm#dis 21

TABLE OF AUTHORITIES – Continued

Page

http://www.acf.hhs.gov/programs/cb/pubs/cm08/chapter4.htm 7

http://www.acf.hhs.gov/programs/cb/pubs/cm08/chapter5.htm 19

http://www.acf.hhs.gov/programs/cb/pubs/cm08/chapter7.htm#reports 12

http://www.nhtsa.gov (publication 811157) 7

INTEREST OF THE *AMICI CURIAE*

Amicus curiae, Bonnie Dumanis, District Attorney for the County of San Diego, State of California, submits this brief for filing as the authorized law officer of San Diego County, and on behalf of Jan Scully, District Attorney for the County of Sacramento, State of California, pursuant to Supreme Court Rules 37.2(a) and 37.4.[1]

Bonnie Dumanis is the elected District Attorney of San Diego County, California, a post she has held since 2003. Prior to 2003, she served as a Judge of the California Superior Court. As District Attorney, Ms. Dumanis is responsible for the criminal prosecution of all felony offenses, and state law misdemeanor offenses occurring outside the City of San Diego, within the county. San Diego County is a jurisdiction of over 3 million people. The District Attorney files

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[1] The San Diego County Charter section 709 states: "The District Attorney is the public prosecutor of the County whose duties are prescribed by law. (Added, effective 8-7-86)." It is provided in the California general law that

> The district attorney is the general prosecutor, except as otherwise provided by law. The public prosecutor shall attend the courts, and within his or her discretion shall initiate and conduct on behalf of the people all prosecutions for the public offenses.

Cal. Gov. Code, § 26500.

In addition, on November 10, 2010, counsel for both the Petitioner and the Respondent filed consents in this Court to the filing of *amicus curiae* briefs in support of either or neither party. *Supreme Court Docket* no. 09-1478.

over 45,000 criminal cases per year. The cases within her prosecution responsibility include physical abuse and sexual abuse and molest of child victims. By virtue of her position, District Attorney Dumanis is concerned with the protection of child victims, and the manner in which child victim cases are investigated.

Jan Scully is the elected District Attorney of Sacramento County, California, a post she has held since 1995. As District Attorney, Ms. Scully is responsible for the criminal prosecution of all felony offenses, and all state law misdemeanor offenses, within the county. Sacramento County is a jurisdiction of over 1.4 million people. The District Attorney reviews over 40,000 criminal cases per year, and files approximately 30,000 of those. The cases within her prosecution responsibility include physical abuse and sexual abuse and molest of child victims. By virtue of her position, District Attorney Scully is concerned with the protection of child victims, and the manner in which child victim cases are investigated.

SUMMARY OF ARGUMENT

The holding in *Greene v. Camreta*[2] has the potential to set back progress in child protection by enforcing an unreasonable and untenable requirement of

[2] *Greene v. Camreta*, 588 F.3d 1011 (2010).

state actors seeking to conduct interviews of children to determine if they have been victimized by abuse. The logic behind this rule of law was based on flawed information which failed to account for improved outcomes for children as a direct result of police involvement in child protection.

In response to the holding, attorneys for school boards throughout the jurisdiction of the lower court have issued written directives to staff prohibiting interviews of children related to events that did not occur at school without a warrant or order. The practical impact is that law enforcement is hampered in child protection investigations and other preliminary criminal investigations which benefitted from the availability of a safe forum to conduct consensual investigative interviews without exposure to scrutiny by a police-wary community, familial pressure, or the knowledge of an abusive parent.

This brief establishes that statutory schemes such as Oregon's which regulate child protection in a non-discretionary manner by requiring a response to all reports of child abuse in a cooperative effort by social services and law enforcement in order to improve outcomes for children are an essential component of the state's special need to protect children in a manner that far exceeds the goals of normal crime detection.

In conducting an analysis of existing case law relevant to special needs searches that require no warrant or individualized suspicion, it is clear that

Oregon's child protection regulatory scheme meets the standards of eligibility established by the United States Supreme Court. It serves a legitimate special need; it was not conceived for the purposes of law enforcement; it employs non-discretionary standards, and the reasonable location, time, and manner requirements are satisfied in the current context where the mandated investigation is conducted in a public school during regular school hours by trained professionals whose complimentary skill sets are designed to further the state's heavy interest in child protection.

ARGUMENT

A. The state has a "special need" and historical obligation to protect children which far exceeds the normal need for law enforcement detection and prosecution.

Identifying the origins of state power in America, historian William Novak noted the doctrine of *parens patriae* was derived from the "amiable capacity" of the king "to take care of his subjects as are legally unable, on account of mental incapacity whether it proceed from first nonage: second, idiocy; or third, lunacy: to take proper care of themselves and their property."[3] The historical record demonstrates that in

[3] William Novak, *Common Regulation: Legal Origins of State Power in America*, 45 HASTINGS L.J. 1061, 1093-1094

(Continued on following page)

the late 18th and early 19th centuries states passed laws which reflected the government's role as an insurer of public happiness – regulating personal conduct when it offended others. Among those early regulations was the identification of those who abandoned their children as disorderly persons.[4] Less than 50 years after the signing of the United States Constitution and before the death of James Madison, New York City enacted the first statute enabling government officials to "commit to the almshouse, or other suitable place . . . any child found in a state of want or suffering, or abandonment, or improperly exposed or neglected by its parents. . . ."[5]

Though far less draconian than the New York City statute, most states have developed well studied programs to effectively prevent, investigate, and protect children from abuse. Justice Blackmun's proclamation: "[t]here is no more worthy object of the public's concern" than the need to aid and protect dependent children,[6] has been adopted by legislators throughout the nation, including the Legislative Assembly of Oregon.

(1994) (citing Joseph Chitty, *A Treatise on the Law of the Prerogatives of the Crown* 4 (1820)).

[4] Novak, *supra*, at n 49 and n 53.

[5] J. Robert Shull, *Emotional and Psychological Child Abuse: Notes on Discourse, History and Change*, 51 STAN. L. REV. 1655, 1686 (1999) (citing Homer Folks, *The Care of Destitute, Neglected, and Delinquent Children* 97 (1900)).

[6] *Wyman v. James*, 400 U.S. 309, 318 (1971).

> [F]or the purpose of facilitating the use of protective social services to prevent further abuse, safeguard and enhance the welfare of abused children, and preserve family life when consistent with the protection of the child by stabilizing the family and improving parental capacity, it is necessary and in the public interest to require mandatory reports and investigations of abuse of children and to encourage voluntary reports.[7]

Though the statute was not enacted until 2009, the preceding statute which was amended in 1993 similarly recognized:

> It is the policy of the state of Oregon to recognize that children are individuals who have legal rights and are not chattels of their parents or guardians. [Child protection statutes] . . . shall be liberally construed to the end that a child coming within the jurisdiction of the court may receive such care, guidance, treatment and control as will lead to the child's welfare and the protection of the community. Although there is a strong preference that children live in their own homes with their own families, the state recognizes that this is not always possible or in the best interests of the child or the public.[8]

Oregon statutes mandating investigation of all child abuse reports and collaboration with law

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[7] Or. Rev. Stat. § 419B.007 (2009).

[8] 1993 Ore. ALS 546.

enforcement are silent on the issues of apprehension or prosecution of criminals, proving they serve a purpose other than the normal needs of law enforcement.

1. Children are vulnerable and deserving of protection from abuse and the effective administration of services that improve their future outcomes.

The fact that children are vulnerable requires no proof beyond common experience. Children are typically smaller, less informed, have fewer physical liberties, and no control over their parentage, which at times can result in abuse or death.

As many children are killed each year by abusers as they are in automobile accidents.[9] This fact is important in determining a "special need" as this Court impliedly did in the context of approving non-discretionary traffic checkpoints, while striking down the same activity when it involved individual discretion of officers. Writing for the majority in *Delaware v. Prouse*, Justice White made clear the Court's awareness of "danger to life and property posed by

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[9] NHSTA, *Children Traffic Safety Facts*, DOT HS 811157 (2008) (citing 1,347 fatalities for children 0-14 years old), *available at* http://www.nhtsa.gov (publication 811157); U.S. Department of Health and Human Services, Administration on Children, Youth and Families, *Child Maltreatment*, Chapter 4 (2008) (citing 1,740 fatalities for children 0-18), *available at* http://www.acf.hhs.gov/programs/cb/pubs/cm08/chapter4.htm.

vehicular traffic," even without the support of statistics, and that regulating compliance in an appropriate manner was an "essential [element] in a highway safety program."[10] In *Vernonia School District 47J v. Acton*, Justice Scalia, on behalf of the Court, recognized a special needs exception for random drug testing amongst student athletes who were, as a group, proved to be involved in heightened instances of drug use.[11] On the basis that the combination of drugs and exertion could lead to injury or death of children, the Court endorsed random drug testing without individualized suspicion.[12] That same emphasis on child safety was echoed by Justice Thomas writing for the majority in *Board of Education v. Earls*: "[S]afety factors into the special needs analysis."[13] Justice Thomas' opinion in *Earls* is particularly helpful in that it approved the special needs search without any evidence of a heightened drug problem amongst the targeted students. Satisfied that "drug use carries a variety of health risks for children including death from overdose," the Court upheld its second child-protection based drug testing policy in a public school setting.[14]

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[10] *Delaware v. Prouse*, 440 U.S. 648, 670 (1979).

[11] *Vernonia School District 47J v. Acton*, 515 U.S. 646, 649, 664-665 (1995).

[12] *Id.* at 661-665.

[13] *Board of Education v. Earls*, 536 U.S. 822 (2002).

[14] *Id.* at 836-837.

Other special needs cases have upheld warrantless, non-discretionary searches and seizures in less life threatening circumstances such as routine social service inspections, illegal immigration, and closely regulated activities.[15] Bolstering the case for child protection as a special need of the state is made simpler by the fact that the child in reported abuse cases is not suspect in the investigation.

2. Statistical data show provision of services as a result of child protection investigations results in increased provision of voluntary preventive services to children, even when abuse claims are unsubstantiated.

Addressing the Ninth Circuit's claim that child abuse investigations pose a risk of harm to more children than they help, one need only examine the source of their information for proof of error. Citing a law review article published by a respected Fourth Amendment scholar and advocate for child rights, the court justified its traditional Fourth Amendment approach to initial child abuse interviews.[16] The article relies primarily on anecdotal evidence from a handful of lower court cases to inflame the reader. Unlike the staid interview in this case, all but one of

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[15] *Wyman, supra*; *U.S. v. Martinez-Fuentes*, 428 U.S. 543 (1976); *New York v. Burger*, 482 U.S. 691 (1987).

[16] *Greene v. Camreta*, *supra*, at 1016 (2010).

the lower court cases involved a strip search, removal, or unauthorized medical examination of the child. The exception was a case which took place in a private school setting and involved unreasonable investigative techniques. In a recently published book on preventing child maltreatment, the author herself suggests that open ended interviews of reported victims are far less intrusive than the conduct reported in the cases cited by both her and the Ninth Circuit.[17]

Using statistics cited by the U.S. Department of Health and Human Services in their *Child Maltreatment Report*, author Doriane Lambelet Coleman compared the number of investigations to the number of substantiated claims as the best support for her argument that "in the name of saving children . . . states ultimately cause more harm to many more children than they ever help."[18]

Not surprisingly, similar statistics had been analyzed in other special needs cases. The Court in *Martinez-Fuentes* included statistics showing that of the 10 million cars passing through the border checkpoint, substantially less than one percent carried illegal immigrants.[19] This was of no moment for the

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[17] Kenneth Dodge, editor and Doriane Lambelet Coleman editor and author, *Preventing Child Maltreatment: Community Approaches*, The Guilford Press, 159 (2009).

[18] Doriane Lambelet Coleman, *Storming the Castle to Save the Child*, 47 WM. AND MARY L. REV. 413, 417 and n.8 (2005).

[19] *U.S. v. Martinez-Fuentes*, *supra*, at 554.

Court as it endorsed the checkpoint, even in the case of secondary inspections which detected illegal activity in less than twenty-five percent of all vehicles selected for more rigorous screening.[20]

Lambelet Coleman's analysis also fails to account for rejections based on duplication, lack of jurisdiction, instances where insufficient information is provided to initiate a case, and where abuse occurred, but there is insufficient evidence to warrant further action – a too common problem in child abuse.[21] But most damaging to her hypothesis is that of the 3.2 million reports of abuse documented in the 2007 *Maltreatment Report* and referred to in *Greene*, 3.8 million children received preventive services including: respite care, parenting education, housing assistance, substance abuse treatment, daycare, and individual and family counseling.[22] Approximately 333,000 substantiated victims of abuse and 757,000 non-victims received voluntary, in-home post investigation services aimed at identifying family weaknesses and strengths in order to provide targeted supportive services.[23] That these services protect

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[20] *Id.* at 554 and 563.

[21] U.S. Department of Health and Human Services, Administration on Children, Youth and Families, *Child Maltreatment* (2007), *available at* http://www.acf.hhs.gov/programs/cb/pubs/cm07/chapter2.htm#screen.

[22] *Id.*, *available at* http://www.acf.hhs.gov/programs/cb/pubs/cm07/chapter6.htm.

[23] *Ibid.*

children cannot be ignored. "Sexual abuse has declined 53 percent from 1992–2007, and physical abuse has declined 52 percent" in the same time.[24] Certainly, advances in child protection including multidisciplinary, mandated reporting and investigation, as well as preventive treatment of child abuse have played a role in this momentous reduction.

B. Artificial distinctions between government actors should not preclude the use of investigative techniques that improve outcomes for children.

The Constitution does not distinguish between types of government actors when limiting state power nor should the Court distinguish between them in assessing whether the state can act to protect the public in special needs cases.

1. The participation of law enforcement is not prohibited in special needs cases.

New York v. Burger upheld a special needs search conducted jointly by police officers and state agents, in part because the Court "fail[ed] to see any constitutional significance in the fact that police officers, rather than 'administrative' agents, [were] permitted to conduct the § 415-a5 inspection."[25] That same

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[24] *Child Maltreatment*, *supra* (2008), *available at* http://www.acf.hhs.gov/programs/cb/pubs/cm08/chapter7.htm#reports.

[25] *New York v. Burger*, *supra*, at 717.

opinion noted two other cases where special needs searches were conducted by state actors with traditional police powers.[26] The Court has also endorsed checkpoint stops by Border Patrol agents and joint compliance searches by probation and police.[27]

While some may point to *Ferguson v. City of Charleston*[28] to counter this argument, it was not the involvement of law enforcement *per se*, but rather the development of a specific plan to provide medical testing results to police, threatening prosecution to exact compliance with drug treatment while offering no different medical treatment to either mother or child that so offended the court. *Ferguson* is distinguishable in five significant ways from the instant case:

1. Oregon's child protection statutes provide additional services to children upon a finding of reasonable cause to suspect abuse and they were not devised for the primary purpose of general crime detection as evidenced by the legislative intent expressed in Or. Rev. Stat. § 419B.007 and 1993 Ore. ALS 546.

2. The purpose of the interview was plain and law enforcement involvement was not secreted from the child.

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[26] *New York v. Burger*, *supra*, at n.28.

[27] *U.S. v. Martinez-Fuentes*, *supra*.

[28] *Ferguson v. City of Charleston*, 532 U.S. 67 (2001).

3. There was no search of the person during the school interview.

4. There was no likelihood that the child subject of the alleged seizure was going to be prosecuted or have evidence used against her in any punitive sense.

5. Contrary to findings in *Ferguson* that demonstrated the program discouraged prenatal care by drug users, there is no evidence that child abuse will increase on account of school interviews in mandatory, non-discretionary child protection investigations.

2. Modern law enforcement duties include functions traditionally reserved for regulatory administrators, social workers, community leaders, educators, and parents.

Early police power in America promoted "a well-ordered community devoted to the public happiness and public good."[29] This is still the function of police, who even in their traditional roles help victims of crime who rely on them to intervene in violent scenarios and protect them from danger. "'[O]ur contemporary society . . . is an impersonal one. Many of us do not know the names of our next-door neighbors. Because of this, tasks that neighbors, friends and

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[29] Novak, *supra*, at 1085.

relatives may have performed in the past now fall to the police.'"[30]

The website of the Deschutes County Sheriff's Department provides significant insight into the obligations of modern law enforcement agencies in small counties. In addition to traditional investigation, they also operate a marine and forest patrol and are responsible for civil enforcement. They maintain a "Kid's Corner" website with tips for internet, bicycle, and water safety, prevention of sexual abuse, and a buddy program for children of incarcerated parents. All deputies are required to complete the "Darkness to Light" child protection investigation program operated by the Kids Center, a non-profit, multidisciplinary child protection agency.[31]

The import of these facts is that Deschutes County sheriff's deputies do not function in an isolated world of arrest and prosecution, but play a larger role in the promotion of public good which makes arbitrary distinctions between them and certain other government actors unreasonable when tasked with the mandatory investigation of reported child abuse.

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[30] Matthew Bell, *Fourth Amendment Reasonableness: Why Utah Courts Should Embrace the Community Caretaking Exception to the Warrant Requirement*, 10 BOALT J. CRIM. L. 3, 9 (2005) (citing *People v. Ray*, 21 Cal.4th 464, 472 (1999) (citation omitted)).

[31] Deschutes County Sheriff's Office, *available at* http://sheriff.deschutes.org/Community/Kids-Safety (2010).

3. The majority of states endorse a multidisciplinary approach to child protection and the participation of law enforcement officers in these multidisciplinary teams has specifically improved outcomes for children, which is necessary to further the regulatory scheme.

Eighty percent of states in our nation require law enforcement agents to be involved in emergency removals of children and 67% are required to take all emergency calls reporting child abuse or neglect.[32] More than half of the states have adopted a multidisciplinary approach to child protection.[33] Joint child protection efforts are even codified in federal law: "All reports received shall be promptly investigated, and whenever appropriate, investigations shall be conducted jointly by social services and law enforcement personnel, with a view toward avoiding unnecessary multiple interviews with the child."[34]

This hybrid approach which joins law enforcement (Justice Model) and social service (Therapeutic Model) disciplines in child protection is hailed, almost universally, as the best method for improving

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[32] Vicky Bollenbacher & Taina Sakagawa, *Justice, Therapeutic and Hybrids and Implications for Children's Rights: A Review of State Policy*, Children and Youth Services Review 28 ECHYSR 6, 682-703 (2006).

[33] *Ibid.*

[34] 42 U.S.C. § 13031 (1990).

outcomes for children.[35] "In terms of children's rights a Hybrid Model should work best for securing the full range of just rights claims. The Hybrid Model presents opportunities for both the best of the Therapeutic Model and the best of the Justice Model to be obtained simultaneously."[36]

A recent and comprehensive review of available data and literature on the subject of police involvement in child protection services by the director of the National Evaluation of Children's Advocacy Centers, which studies the effectiveness of current models of child abuse investigation, concluded:

> [P]olice do not appear to hinder CPS effectiveness and may, in fact, promote it. Police involvement may increase the probability that CPS finds allegations of maltreatment credible and provides services. . . . There is currently no empirical concern about systematic negative effects of law enforcement involvement on CPS investigations. We recommend that law enforcement and CPS coordinate their child abuse and neglect investigations in every community."[37]

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[35] Bollenbacher et al., *supra*; Theodore Cross et al., *Police Involvement in Child Protective Services Investigations: Literature Review and Secondary Data Analysis*, Child Maltreatment, Vol. 10, No. 3, 224-244 (2005).

[36] Bollenbacher et al., *supra*.

[37] Cross et al., *supra*, at 241-242.

In assessing the particular benefit added by police, the report deemed it possible that "police involvement helps enable CPS interventions by providing more thorough investigations and a greater quantity of evidence. This may help CPS substantiate more cases. . . . Police may also provide support, authority, safety, and investigative expertise to CPS workers, empowering them to work more effectively."[38] This promotion of better outcomes for children "is necessary to further the regulatory scheme."[39] And so this Court has recognized:

> [S]tate police officers . . . have numerous duties in addition to those associated with traditional police work. (citations omitted.) As a practical matter, many States do not have the resources to assign the enforcement of a particular administrative scheme to a specialized agency. So long as a regulatory scheme is properly administrative, it is not rendered illegal by the fact that the inspecting officer has the power to arrest individuals for violations other than those created by the scheme itself. In sum, we decline to impose upon the States the burden of requiring the enforcement of their regulatory statutes to be carried out by specialized agents.[40]

[38] Cross et al., *supra*, at 241.

[39] *New York v. Burger*, *supra*, at 710.

[40] *Id.* at 717-718.

Law enforcement officers are not precluded by precedent from acting to further a state's special needs, further their participation in regulation of child protection results in better outcomes for children due to their specialized investigative training and multifaceted role as government actors. The lower court's opinion has upset this important regulatory service. No sooner was the opinion published when law firms for school districts within the Ninth Circuit's jurisdiction issued mandatory restrictions on the access to children at public schools during school hours without a warrant or written consent of a parent. This Court should not restrict the good work of law enforcement in the regulation of child protection, as did the lower court when it established an arbitrary distinction between government actors in order to reject a claim of special need.

C. Applying the warrant requirement of the Fourth Amendment to the initial interview of a child in a non-home setting will result in a failure to protect children.

More than 80% of all child abuse is perpetrated by parents and thus likely to occur within the protected curtilage of the abuser's home.[41] Children are twice as likely to be abused by their mother and 18%

[41] U.S. Department of Health and Human Services, *supra* (2008), *available at* http://www.acf.hhs.gov/programs/cb/pubs/cm08/chapter5.htm

of the time the child will be abused by both parents.[42] This makes the investigation of child abuse particularly difficult as the child may have been groomed into silence, beaten into submission, or so emotionally disabled that he or she is incapable of report. Additional complications include love for the abusive parent, fear of dramatic consequences for the child and any siblings, and loss of support from a non-abusive, yet abuse-enabling parent.

These circumstances, inherent in the overwhelming majority of child abuse cases, demonstrate the necessity for school interviews. So helpful is it to have a neutral location where the child can feel safe away from the influence of the abuser that states have enacted laws with specific procedures for interviewing reportedly abused children at school.[43] The school setting helps to "carefully [limit] the time, place, and scope" of government action, which is required in special needs cases.[44]

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[42] *Ibid.*

[43] Cal. Pen. Code § 11174.3(a) (2010); Or. Rev. Stat. § 419B.045 (2009).

[44] *New York v. Burger*, 482 U.S. 691, 703 (1987) (citing *United States v. Biswell*, 406 U.S. 311, 315 (1972).)

1. First indications to the state regarding alleged abuse of a child rarely provide sufficient information to prove probable cause or exigent circumstances and warrants based on less than probable cause have been disapproved.

While the concern for abuse in the instant case evolved from another child protection investigation, it highlights the difficulties of predicating an initial interview on the development of probable cause or reasonable suspicion under the most common circumstances. The majority of child abuse investigations are generated by professionals who have a legal obligation to disclose all allegations of abuse.[45] Rarely will this be someone with personal knowledge of the facts. Less than 15% of reporters have non-professional relationships with the child.[46] Instead, teachers, legal and medical personnel, and law enforcement are likely to report second- or even third-hand accounts of the abuse. In child abuse, the impossibility of securing a warrant without an opportunity to conduct an initial report with the child has far less to do with time constraints, and everything to do with the quantum of evidence presented in an initial referral.

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[45] U.S. Department of Health and Human Services, *supra* (2008), *available at* http://www.acf.hhs.gov/programs/cb/pubs/cm08/chapter2.htm#dis

[46] *Ibid.*

Further complicating matters is the Court's disapproval of warrants based on less than probable cause in *Griffin v. Wisconsin*.[47] In assailing the dissent of Justice Blackmun, who advocated that a warrant based on less than probable cause would be a better substitute for unbridled probation searches, Justice Scalia reasoned for the majority that "[t]he Constitution prescribes . . . that where the matter is of such a nature as to require a judicial warrant, it is also of such a nature as to require probable cause."[48]

These sad realities do not bode well for the protection of children. Without an exception to the traditional Fourth Amendment requirements, state actors will be paralyzed by a lack of information and forced to close unsubstantiated cases leaving children unprotected. While some could argue the merits of further investigation, a crime that involves the intimate infliction of violence, sexual abuse, or neglect by a parent usually requires information from an insider – the victim or his siblings. In the Ninth Circuit, abusers are free to thwart such investigations by refusing consent to interview the child. Shrouded in the cocoon of child privacy, the abuser may continue his or her campaign of terror.

In no other scenario would courts impose a requirement of consent by a potential offender in order to speak with a victim, outside of the home,

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[47] *Griffin v. Wisconsin*, 483 U.S. 868, 873 (1987).

[48] *Ibid.*

when neither probable cause nor exigent circumstances can be demonstrated.

D. Oregon's child protection statute provides an adequate substitute for the warrant requirement.

Deschutes County sheriff's deputies are mandated by law to respond to all reports of child abuse they receive. "If the department of Human Services or a law enforcement agency receives a report of child abuse, the department or agency shall immediately: (a) Cause an investigation to be made to determine the nature and cause of the abuse of the child."[49]

The imperative nature of the statute and the identification of the parties responsible for investigation satisfies the Court's rule in *New York v. Burger* where a statutory regulation was deemed to be an adequate substitute for a warrant because "the vehicle dismantler knows that the inspections to which he is subject do not constitute discretionary acts by a government official, but are conducted pursuant to statute . . . and notifies the operator who is authorized to conduct such an investigation."[50]

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[49] Or. Rev. Stat. § 419B.020 (2009).

[50] *New York v. Burger*, *supra*, at 711.

E. When an allegation of child abuse comes to the attention of state actors, confined by statute to a non-discretionary response, they should be able to conduct a reasonable interview with the child in a school setting without probable cause, reasonable suspicion, or parental consent in order to determine if the child needs protection.

> A [s]tate can address a major social problem both by way of an administrative scheme and through penal sanctions. Administrative statutes and penal laws may have the same ultimate purpose of remedying the social problem, but they have different subsidiary purposes and prescribe different methods of addressing the problem. . . . [A] regulatory approach contrasts with that of the penal laws, a major emphasis of which is the punishment of individuals for specific acts of behavior.
>
> In *United States v. Biswell*, we recognized this fact that both administrative and penal schemes can serve the same purposes by observing . . . the ultimate purposes of the . . . Act [and the statute to be in harmony].[51]

The Oregon statutes directing child protection investigations are qualifying administrative statutes which notify the public that joint investigations of child abuse reports by law enforcement and social

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[51] *Id.* at 712-713 (text in brackets not in original).

services are mandated by law. The statutory scheme upon which these statutes rest was designed to serve a special need of government: the protection of children from abuse. The regulations enacted support that function by providing efficient and effective procedures which improve outcomes for children as proved by concrete data. The statutes are not based on criminal sanctions, but rather the provision of adequate services to insure their health and safety.

These regulations provide an adequate substitute for the warrant requirement as they are non-discretionary and clearly advise the public which government actors are permitted to investigate reports of child abuse. The regulations do not permit the imposition of involuntary services unless there is reasonable cause to believe that a child has been abused. Even then, the statutory scheme mandates services designed to keep families intact where warranted.

School interviews, which are also authorized under the scheme, further the special needs of the government's interest in protecting children by allowing interviews in a safe location that is known to the child during regular business hours where school officials charged with the care of the child can intervene in any unreasonable conduct by other government actors.

Interviews of children are the least intrusive means available to government actors in a child protection investigation. The case at hand presents

no issue of refused consent, trickery, or intrusive search during the relevant encounter with S.G. Instead it asks for permission to "follow up" with questions as impliedly endorsed by Justice Ginsberg in her concurrence and dissent in *Safford v. Redding*.[52]

CONCLUSION

Having satisfied each prong of the special needs test that has evolved through the opinions of this Court, the *amici* seek approval for reasonable interviews of all reported victims of child abuse at school during school hours without requiring probable cause or reasonable suspicion.

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Respectfully submitted,

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[52] *Safford Unified Sch. Dist. #1 v. Redding*, 129 S. Ct. 2633, 2645 (2009) (Ginsberg concurring in part, dissenting in part).